

**WEA Engineers & Associates Sdn Bhd v Grandstep
Development Sdn Bhd** A

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22C-89-10 OF 2018 B
LIM CHONG FONG J
29 JUNE 2020

Contract — Claim for remuneration — Services rendered by engineer — Whether plaintiff entitled to sum of remuneration claimed for civil and structural engineering consultancy services rendered — Whether defendant entitled to invoke defence of laches — Plaintiff entered into agreement with defendant for engineering consultancy services — Contracts Act 1950 s 71 C D

The defendant was the developer of a hill slope development ('the project'). The defendant approached and requested the plaintiff to quote for engineering consultancy services for the project. The plaintiff accordingly furnished its quotation proposal ('the proposal') to the defendant. Subsequently, the defendant issued its letter of appointment to the plaintiff ('the appointment letter'). Pursuant to the appointment letter, the plaintiff carried out civil and structural engineering consultancy services as required by the defendant. The plaintiff consequently issued two interim payment invoices for civil and structural engineering services rendered ie in the sum of RM231,875 and RM563,750. However, the defendant only made a payment of RM57,679.90. The plaintiff was displeased with the defendant's failure to settle the invoices in full. The plaintiff therefore issued its invoice in the sum of RM985,757.60. On the same day, the plaintiff gave the defendant 60 days' notice of termination in accordance the Regulations of the Board of Engineers Malaysia. The plaintiff thereafter issued its invoice in the sum of RM278,250. The defendant accepted the plaintiff's notice of termination. The plaintiff subsequently further issued its invoice in the sum of RM46,375. The defendant then made further payments in the sum of RM161,063.58 and RM1,607.77. By reason of the defendant's non-settlement of the plaintiff's invoices as claimed, the plaintiff commenced this action. E F G H

Held:

- (1) The applicable terms on the plaintiff's remuneration were as set out under the terms and conditions in the appointment letter. The costs of works were the costs for the whole project minus interior design works. This was because the scope of the civil and structural engineering consultancy services contract as set out in the proposal and acceptance letter was plainly for the whole project inclusive of the infrastructure I

- A** works. Therefore, the applicable costs of works of the project was RM336,193,895 (see paras 35 & 42).
- B** (2) The plaintiff was significantly involved in the infrastructural works. The plaintiff was also involved in advising on the building works preliminary design although the plaintiff's input was not as extensively required compared to the input required of the architect and town planner at the material time. In the circumstances, the plaintiff had nonetheless substantially completed stage A1 of the whole project and hence entitled to full payment for that stage. However, since the plaintiff had not substantially completed any of the other stages beyond stage A1 of the schedule of payment, the plaintiff was hence entitled to payment of stage A1 only as at the mutual termination of the consultancy services contract. Since the defendant had already paid RM220,351.25, the plaintiff should be still be paid the balance of RM177,927.56 plus 6% GST if applicable (see paras 53 & 56–59).
- C**
- D** (3) The application of the equitable defence of estoppel, acquiescence and laches was fact sensitive depending on the peculiar circumstances of each case. There must be prejudicial change in position of the defendant having been caused by the plaintiff's inaction to justify the invocation of the defence of laches. There was no cogent evidence of the same adduced by the defendant here. Consequently, the defendant was disentitled to invoke this equitable defence of laches (see paras 66–67).
- E**
- F** **[Bahasa Malaysia summary]**
- Defendan adalah pemaju satu pembangunan lereng bukit ('projek'). Defendan menemui dan meminta plaintif untuk menyebut harga perkhidmatan perundingan kejuruteraan untuk projek tersebut. Oleh itu, plaintif mengemukakan cadangan sebut harga ('cadangan') itu kepada defendan.
- G** Selepas itu, defendan mengeluarkan surat lantikan kepada plaintif ('surat lantikan'). Berdasarkan surat lantikan itu, plaintif menjalankan perkhidmatan perundingan kejuruteraan awam dan struktur sebagaimana yang dikehendaki oleh defendan. Plaintif selepas itu mengeluarkan dua invois bayaran interim untuk perkhidmatan kejuruteraan awam dan struktur yang diberikan iaitu berjumlah RM231,875 dan RM563,750. Walau bagaimanapun, defendan hanya membuat pembayaran sebanyak RM57,679.90. Plaintif tidak berpuas hati dengan kegagalan defendan untuk menyelesaikan invois sepenuhnya. Oleh itu, plaintif mengeluarkan invoisnya berjumlah RM985,757.60. Pada hari yang sama, plaintif memberikan notis penamatan 60 hari kepada defendan sesuai dengan Peraturan Lembaga Jurutera Malaysia. Plaintif selepas itu mengeluarkan invoisnya berjumlah RM278,250. Defendan menerima notis penamatan plaintif. Plaintif kemudiannya mengeluarkan invoisnya berjumlah RM46,375. Defendan kemudian membuat pembayaran selanjutnya berjumlah RM161,063.58 dan RM1,607.77. Oleh kerana
- H**
- I**

defendan tidak menyelesaikan invoice plaintif seperti yang dituntut, plaintif memulakan tindakan ini.

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Diputuskan:

- (1) Terma-terma yang terpakai mengenai bayaran plaintif adalah seperti yang termaktub di bawah terma dan syarat dalam surat lantikan. Kos kerja adalah kos untuk keseluruhan projek ditolak kerja reka bentuk dalaman. Ini adalah kerana skop kontrak perkhidmatan perundingan kejuruteraan awam dan struktur seperti yang dinyatakan dalam cadangan dan surat persetujuan adalah jelas untuk keseluruhan projek termasuk kerja infrastruktur. Oleh itu, kos kerja projek tersebut adalah RM336,193,895 (lihat perenggan 35 & 42).
- (2) Plaintif terlibat secara signifikan dalam kerja-kerja infrastruktur. Plaintif juga terlibat dalam memberi nasihat mengenai reka bentuk awal kerja-kerja bangunan walaupun input plaintif tidak diperlukan secara meluas berbanding dengan input yang diperlukan oleh arkitek dan perancang bandar pada waktu material. Dalam keadaan itu, plaintif telah menyelesaikan tahap A1 secara keseluruhan dari keseluruhan projek dan dengan itu berhak mendapat pembayaran penuh untuk tahap tersebut. Akan tetapi, oleh kerana plaintif tidak menyelesaikan tahap-tahap lain secara substansial di luar tahap A1 dari jadual pembayaran, maka plaintif berhak mendapat pembayaran tahap A1 hanya pada saat berakhirnya kontrak perkhidmatan perundingan. Oleh kerana defendan telah membayar RM220,351.25, plaintif harus dibayar baki sebanyak RM177,927.56 ditambah 6% GST jika ada (lihat perenggan 53 & 56–59).
- (3) Penggunaan pembelaan estoppel, persetujuan dan laches adalah sensitif bergantung kepada keadaan yang unik dari setiap kes. Perlu ada perubahan yang menjejaskan terhadap kedudukan defendan yang disebabkan oleh kelakuan plaintif untuk membenarkan penggunaan pembelaan laches. Tidak ada bukti yang meyakinkan yang dikemukakan oleh defendan di sini. Oleh itu, defendan tidak berhak untuk membangkitkan pembelaan laches (lihat perenggan 66–67).]

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Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (folld)
Choong Howei v Cheah Choo Eng & Ors and another appeal [2015] 6 MLJ 95; [2018] 1 MLRA 650, CA (refd)
KP Kunchi Raman v Goh Brothers Sdn Bhd [1978] 1 MLJ 89 (refd)
Low Chi Yong v Law Chi Hong & Anor [2017] MLJU 1657, FC (refd)
Malaysia Building Society Bhd v Modern Crest Sdn Bhd & Ors [2007] 2 MLJ 169, HC (folld)

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- A** *Moore and Others v Smith* (1972) 19 WIR 376, HC (refd)
Muhamad Salleh bin Saarani & Anor v Norruhadi bin Omar & Ors [2010] 9 MLJ 603, HC (refd)
Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi Ahmad & Ors [2005] 2 MLJ 32; [2004] 2 MLRA 439, CA (refd)
- B** *Siow Wong Fatt v Susur Rotan Mining & Anor* [1967] 2 MLJ 22, PC (refd)
Udachin Development Sdn Bhd v Datin Peggy Taylor [1985] 1 MLJ 121, FC (refd)

Legislation referred to

- C** Construction Industry Payment and Adjudication Act 2012
Contracts Act 1950 s 71
Limitation Act 1953
Registration of Engineers Act 1967 s 7A(1)
- D** Rules of Court 2012 O 18 r 8(1)(b), O 22B
Street Drainage and Building Act 1976
- Gan Chong Chieh (Prisilla Chong Mun Mun and Wong Sue Ann with him) (Mah Weng Kwai & Assoc) for the plaintiff.*
- E** *Mohd Daud Leong (Kok Pok Chin with him) (KF Ee & Co) for the defendant.*

Lim Chong Fong J:

INTRODUCTION

- F** [1] This is a trial judgment on a consulting civil engineer's professional consultancy services contract fee claim.
- [2] The plaintiff is a body corporate registered with the Board of Engineers Malaysia pursuant to the Registration of Engineers Act 1967.
- G** [3] The defendant is a private limited company involved in property development business.

H PRELIMINARY

[4] In the action, the plaintiff prayed for the following reliefs in para 41 of the statement of claim:

- I** (a) that the defendant to pay the plaintiff the sum of RM1,176,210.34;
- (b) pre-judgment interest on each invoiced amount at the rate of 5%pa from the date of each invoice respectively until the date of the decision;
- (c) costs;

- (d) post-judgment interest on the total sum of amounts claimed in para 41.1, 41.2 and 41.3 above at 5%pa from the date of decision until full settlement; and A
- (e) such other reliefs deemed fit and just by this honourable court. B

The defendant originally made a counterclaim but it was withdrawn during pre-trial case management on 31 May 2019.

[5] The trial of this action took three days on 11 September, 6 and 7 November 2019. C

[6] The trial documents were marked as bundles BOP, A to E and CBOD 1 to 4. The documentary evidence in the aforesaid bundles CBOD 1 to 4 carry status B save for bundle CBOD 3 which carries status A. During the course of trial, exhs P1 and D2 were also admitted in evidence. D

[7] The plaintiff called its managing director Dr. Wong Fook Keong ('SP1') as its sole witness at the trial. E

[8] The defendant called four witnesses at the trial. They are as follows:

- (a) Ho Peng Keat (SD1), an architect and director of DMP Architects Sdn Bhd;
- (b) Ng Beng Hooi (SD2), a quantity surveyor and employee of Jurukur Bahan Bersatu; F
- (c) Tan Ean Seng (SD3), the project manager of the defendant; and
- (d) Tan Peng Soon (SD4), a director of the defendant G

[9] After the close of trial, the parties simultaneously furnished their written closing submissions in chief followed by written submissions in reply as directed by me. Oral clarification with counsel was held on 21 February 2020. As a result, further written submission were produced by parties. H

BACKGROUND FACTS

[10] The defendant is the developer of a hill slope development known as 'Proposed Housing Development on Lot 1287, Seksyen 14, Bandar Ampang, Daerah Hulu Langat, Selangor Darul Ehsan' ('project'). I

[11] In early 2011, the defendant approached and requested the plaintiff to quote for engineering consultancy services for the project. The plaintiff accordingly on 18 February 2011 furnished its quotation proposal ('proposal')

A to the defendant. The proposal is reproduced below:

B

**WEA Engineers & Associates Sdn. Bhd.**

(Company No: 400971-W)

Consulting Geotechnical, Civil & Structural Engineers

No. 8-4, Jalan TP 2/2, Taman Serdang Perdana, Seksyen 2,
43300 Seri Kembangan, Selangor Darul-Ehsan, Malaysia.

Tel: 603-8945 6686 • Fax: 603-8945 2686 • Email: wea@wea.com.my

C

Our Ref: WEAS/Proposal/1101a

18 February 2011

D

GrandStep Development Sdn. Bhd. (769692-A)

38-3-1, Jalan 4/91

Taman Shamelin Perkasa, Cheras

56100 Kuala Lumpur

Attn: Mr. Tan Ean Seng

(T: 03-9281 3063 F: 03-9281 1063)

E

Dear Sir

**CADANGAN PEMBANGUNAN PERUMAHAN DI ATAS LOT 1287, SEKSYEN 14,
BANDAR AMPANG, DAERAH HULU LANGAT, SELANGOR DARUL EHSAN**
- Proposal for Professional Civil & Structural Engineering Consulting Services -We are pleased to submit herein our proposal for professional Civil & Structural Engineering
Consultancy Services for the above project for your kind consideration.

F

1. THE PROJECT

The Project is a hill-slope development comprising landed properties and medium to high-rise apartments

G

2. SCOPE OF SERVICES

The general scope of professional services in connection with the building and infrastructure works includes: -

A. Civil & Structural Engineering Design Services

B. Construction inspections/supervisions where either the Employer seconded full-time site supervision staff working under our instruction.

We shall perform the appropriate duties that may be required in any contract for the execution of the Works within our scope of services.

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(Page 1 of 4)

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Pending Order:
Date 2-3-11, Level 3,
Surabaya Trade Centre,
No. 2 Gd Wdch Moodam.10000 No. 100, Ampang,
Tel: 603-8945 6686
Fax: 603-8945 2686Serial number will be used to verify the originality of this document via eFILING portal
Email: wea@wea.com.my



Our Ref: WEAS/Proposal/1101a dated 18 February 2011
Page 2

The professional services will generally be provided in the following stages: -

i. Preliminary stage

- a) Establish and analyze the initial Project scope definition;
- b) Advise on the site investigation for the project;
- c) Investigate data and information pertinent to the Works;
- d) Establish design philosophies;
- e) Develop structural framing concepts, floor systems and foundation proposals;
- f) Develop infrastructure works within parcel inclusive of earthworks, road & drainage, water reticulation and sewer reticulation;
- g) Produce sufficient structural information to enable the Architect to prepare his layout plans;
- h) Advise on the necessity or special surveys or investigations and henceforth to advise on the result, and
- i) Liaison with relevant authorities on matters in connection with the civil and structural design of the Works and to obtain approvals.

ii. Design Stage

- a) Assist the Architect in the design development of the proposal buildings;
- b) Prepare such calculations and details relating to the Works as may be required for submission to any appropriate authority;
- c) Develop designs in collaborations with the Architect and prepare calculations, drawings and specifications for use by the Quantity Surveyor;
- d) Advise on conditions of contract relevant to the works and forms of tender and invitations to tender as they relate to the Works.
- e) Assist the relevant demolition and repair experts on the engineering evaluation of abutting buildings, including the design of any stabilization and rebuilding works.

iii. Tender Stage

- a) Assist to pre-qualify contractors;
- b) Assist the Quantity Surveyor in the preparation of budgetary cost estimates;
- c) Assist the Quantity Surveyor in the preparation of tender documentation; and
- d) Assist in the evaluation of tender bids.

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Our Ref: WEAS/Proposal/1101a dated 18 February 2011
Page 3

B

iv. Construction Stage

- a) Advise on the preparation of contract documents relating to accepted tenders for the Works;
- b) Advise on the appointment of site supervision staff;
- c) Checking shop details for accuracy, general dimensions and adequacy of members and connections;
- d) Provide periodic supervision during construction;
- e) Co-ordinate design changes;
- f) Advise on and where appropriate, issue certificates for payments to the Contractors.

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3. APPROVALS

We shall liaise with the relevant authorities to ensure compliance with requirements towards getting the required approvals.

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4. PROFESSIONAL FEE & SCHEDULE OF PAYMENT

Based on the described services above and for hill-slope projects, our proposed professional fees shall be at 1.25% of the cost of the Works. The cost of the Works will be as defined in paragraph 4 of the Board of Engineers, Malaysia's Notification on 20th April 1982 and as approved by the Minister of Works and Public Utilities on 13th May 1982.

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The Service Tax, currently at 6% levied by Customs & Excise, shall be borne by the Employer. The stamp fee on the consultancy agreement, which is currently at 0.1% of the Professional fee, shall also be borne by the Employer.

Our proposed schedule of payment for each phase of the development shall be as follows: -

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<u>Upon Completion of Each Stage</u>	<u>Percentage Fee for Each Stage</u>
a) Preliminary Stage	10%
b) Design Stage (a & b)	15%
c) Design Stage (c & d)	35%
d) Tender Stage	10%
e) Construction Stage	30%
TOTAL	100%

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(Page 3 of 4)

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Our Ref: WEAS/Proposal/1101a dated 18 February 2011
Page 4

5. REIMBURSEMENTS

We shall be entitled for reimbursements, but with your prior approval, in connection with:

- a) Site Supervision provided by us for continuous supervision of Works.
- b) Expenses relating to any trips to locations outside Selangor and Kuala Lumpur.
- c) Advertisements for tenders and for site staff.
- d) Supply of drawings other than the following:
 - i. All drawings for submission to the Authorities;
 - ii. One set of each drawing to the Employer, the Architect and the Quantity Surveyor;
 - iii. Two sets of each Construction drawing to the Contractor.

Additional drawings shall be charged based on RM8.00 per A1 size drawing.

6. OTHER TERMS AND CONDITIONS

The other terms and conditions of our engagement where not expressly mentioned herein shall be in accordance with those stipulated in the Board of Engineers, Malaysia's Conditions of Engagement (approved by the Minister of Works and Public Utilities on 13th May 1982). In the event of any conflict in the terms and conditions, this letter shall take precedence.

For such hill-slope projects, the Authorities may require the preparation and submission of special geotechnical and/or other reports and these shall be performed by independent consultants engaged directly by the Employer.

We trust that you will give the above your favourable consideration and we look forward to be given the opportunity of providing our professional services for your project.

Thank you.

Yours faithfully
WEA Engineers & Associates Sdn. Bhd.

IR. DR. WONG FOOK KEONG
Managing Director

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[12] Subsequently, the defendant on 21 February 2011 issued its letter of appointment to the plaintiff ('appointment letter'). The appointment letter is reproduced below:

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GranStep Development Sdn Bhd (769692-A)

38-3-1, Jalan 4/91, Taman Shamelin Perkasa
Cheras, 56100 Kuala Lumpur, Malaysia
Tel: 603-9281 3063 Fax: 603-92811063

B

Our ref: GD/APG-1287/WEA/11(01)
Date : 21st February 2011

C

M/s WEA Engineers & Associates Sdn. Bhd.
No. 8-4, Jalan SP 2/2
Taman Serdang Perdana, Seksyen 2
43300 Seri Kembangan, Selangor
Attn: Dr. Wong Fook Keong

Dear Sir,

Indah Height

D

**Cadangan Pembangunan Perumahan Di Atas Lot 1287, Seksyen 14, Bandar Ampang,
Daerah Hulu Langat, Selangor Darul Ehsan.**
- Letter of Appointment As Civil & Structural Consultant Engineers

We refer to the above and your proposal ref: WEAS/Proposal/1101a dated 18th February 2011 and are pleased to confirm your appointment as our Civil & Structural Consulting Engineer subject to the following terms and conditions:

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Terms & Conditions

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- a. The total professional fees excluding Government service tax shall be 1.25% of the cost of the Works but excluding cost of Interior Design (ID) works.
- b. Schedule of Payment is set out as per attached Appendix A.
- c. The Scope of Works shall cover all civil and structural design, assisting in liaison and obtaining all necessary government approvals, tender and contract administration, attending meetings and periodic site supervision of the project until its completion as per item no.2 of your proposal and including all geotechnical studies reports and designs other than those to be performed by independent consultants as required by the Authorities.

G

d. Termination

The engagement of the Consultant Engineer may be terminated at any time by the Client if the Consultant Engineer fails to fulfill the Client's requirement under the terms of professional practice by giving to the Consultant Engineer thirty (30) days' notice in writing, whereupon the engagement of the Consultant Engineer under the appointment shall be terminated upon the expiry of the said period of notice.

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Our ref: GD/AFG-1287/WEA/11(01)
Date : 21st February 2011

The termination of either party shall be mutually agreed.
In pursuant to the termination notice:-

1. the Consultant Engineer shall be paid for the remuneration including such fees as shall be due up to the effective date of termination (base on the Schedule of Payment as per Appendix A).
2. the Consultant Engineer shall have no right to object the appointment of another consultant and shall release the Letter of Discharge upon receiving his remuneration due to him.
3. the Consultant Engineer shall deliver all documents necessary to the Client for the new Consultant to continue with the project.

The terms and conditions of this Letter of Appointment shall take precedence if there is any discrepancy/ inconsistency between the terms and conditions of your proposal and this Letter of Appointment.

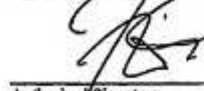
Kindly confirm your acceptance of the above by signing and returning the duplicate of this letter within one (1) week from the date hereof.

Thank you.

Yours faithfully
GRANITE DEVELOPMENT SDN BHD


TAN AH CHAI
Director

We, WEA Engineering & Associates Sdn. Bhd. hereby agree and accept the terms and conditions which are stated herein.

		
Authorised Signatory		Witness
DR. WONG POO KOK		GHEE YEE YEE
Name		Name
MANAGING DIRECTOR		SECRETAR
Designation		Designation
2/2/11		20/2/11
Date		Date

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A

Our ref: GD/AFG-1287/WEA/11(01)
Date : 21st February 2011

The termination of either party shall be mutually agreed.
In pursuant to the termination notice:-

B

1. the Consultant Engineer shall be paid for the remuneration including such fees as shall be due up to the effective date of termination (base on the Schedule of Payment as per Appendix A).

C

Our ref: GD/AFG-1287/WEA/11(01)
Date : 21st February 2011

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APPENDIX A

Cadangan Pembangunan Perumahan Di Atas Lot 1287, Seksyen 14, Bandar Ampang, Daerah Hulu Langat, Selangor Darul Ehsan.

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Mode of Payment	%	Cumulative %
A. Pre-contract (50%)		
1). Acceptance of preliminary design	10	10
2). Submission of plans to authorities for approval	20	30
3). Upon obtaining approval from authorities	10	40
4). Upon completion of all drawings for calling of tender	5	45
5). Award of Contract	5	50
B. Post-contract (50%)		
1). Contract Administration and Management (by % of progress of works on site)	45	95
2). Issuance of Certificate of Completion and Compliance (CCC)	5	100

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Additional drawings other than stated in your proposal shall be charged based on RM4.00 per A1 size drawing.



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[13] Pursuant to the appointment letter, the plaintiff carried out civil and structural engineering consultancy services as required by the defendant. The services were provided in conjunction with the other consultants appointed by the defendant including DMP Architects Sdn Bhd, Juruasli Planning & Consultancy and Jurukur Bahan Bersatu.

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[14] The plaintiff consequently by letter dated 13 October 2014 issued two

interim payment invoices for civil and structural engineering services rendered, vis:

- (a) Proforma Invoice No WEAS/IH/PIPF/01A dated 10 October 2014 in the sum of RM231,875; and
- (b) Proforma Invoice No WEAS/IH/PI/PF/02 dated 13 October 2014 in the sum of RM563,750.

[15] However, the defendant on 17 November 2014 only made a payment of RM57,679.90.

[16] The plaintiff was displeased with the defendant's failure to settle the aforementioned proforma invoices in full. The plaintiff therefore issued its Invoice No WEAS/IH/PF/01 dated 2 January 2015 in the sum of RM985,757.60.

[17] On the same day on 2 January 2015, the plaintiff gave the defendant 60 days notice of termination in accordance the Regulations of the Board of Engineers Malaysia.

[18] The plaintiff thereafter issued its Invoice No WEAS/IH/PF/02 dated 16 January 2015 in the sum of RM278,250.

[19] The defendant by letter dated 22 January 2015 accepted the plaintiff's notice of termination.

[20] The plaintiff subsequently further issued its Invoice No WEAS/IH/PF/03 dated 12 February 2015 in the sum of RM46,375.

[21] The defendant then on 27 October 2015 and 3 November 2015 made further payments in the sum of RM161,063.58 and RM1,607.77 respectively.

[22] The planning permission of the project was received on 18 July 2016.

[23] By reason of the defendant's non-settlement of the plaintiff's invoices as claimed, the plaintiff commenced this action on 24 October 2018.

ISSUE FOR DETERMINATION

[24] From the pleadings and submissions made by the parties, there is my view only a sole issue which required determination, to wit; the proper remuneration of the plaintiff for the civil and structural engineering consultancy services rendered to-date.

A CONTENTIONS OF THE PARTIES

[25] The plaintiff contended that it is entitled to the sum in all its three invoices sent to the defendant as claimed plus a further RM36,093.75.

B [26] According to the plaintiff, the invoices represented 75% of the stage A1, 75% of stage A2 and 70% of stage A3 of the mode of payment set out in the appointment letter. The additional claim of RM 36,093.75 represented 16.5% of stage A4 of the mode of payment set out in the appointment letter.

C [27] On the other side, the defendant contended that the plaintiff's claim is grossly excessive. According to the defendant, the plaintiff did not complete the services as contracted due to the plaintiff's own termination of the provision of the civil and structural engineering consultancy services pursuant to the appointment letter.

D

[28] The defendant stressed that it has fairly and reasonably paid the plaintiff the sum of RM220,351.25 in total for the civil and structural engineering consultancy services rendered thus far. This is because the plaintiff had provided services relating to the infrastructure only but not on the building structure of the project.

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[29] In addition, the defendant contended that the action was instituted in afterthought three years after the conclusion of the adjudication proceedings between them pursuant to the Construction Industry Payment and Adjudication Act 2012. This is due to the plaintiff's excessive desire for more money.

F

G FINDINGS OF THE COURT

[30] The services rendered by the plaintiff here have been partially performed only.

H [31] Unless otherwise provided in the contract, this will generally attract the application of quantum meruit in principle. Quantum meruit is codified in s 71 of the Contracts Act 1950 which reads:

71. Obligation of person enjoying benefit of non-gratuitous act

I Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

ILLUSTRATIONS

- (a) A, a tradesman, leaves goods at B's house by mistake B treats the goods as his own. He is bound to pay A for them.
- (b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

A

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and interpreted by the Privy Council in *Siow Wong Fatt v Susur Rotan Mining & Anor* [1967] 2 MLJ 22.

[32] The quantum meruit assessment of remuneration of professional services rendered may be done based on the product of the time spent at a reasonable hourly charge rate. However in the High Court of Barbados case of *Moore and Others v Smith* (1972) 19 WIR 376, Johnson J (Ag) held as follows in relation to a claim for partial architectural services rendered:

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I have earlier in this judgment set out a short list of the work done and services rendered by the plaintiffs. Following the principle laid down by BIRKETT J., what I think I have to do is to take all these matter into account. For example, I have to take into account the fact that the parties referred to a percentage. As I said before that was a matter which was clearly in the minds of the plaintiffs and the defendant. But I think what I have to really take into account is this. First of all I have to consider and form my own opinion as to the true estimate of the merit of the work done and services rendered. I should have thought it quite impossible (as urged by counsel for the defendant) to estimate the true amount to be paid to an architect purely based on time basis. As Birkett, J., said:

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I don't know what are people are like, but in the ordinary affairs of everyday life, quite apart from professional life, if one has a problem of conduct, or whatever it may be, it is continuously hovering in the mind. If you are going to write a book or if you are embarking on some project of that nature the thing is continuously with you until the work is accomplished, but you cannot estimate the thing upon a time basis. The moment of inspiration that comes to a man in almost any walk of life – is that to be measured by time? The architect who suddenly solves the problem of how to deal with a particular situation reaching a solution it may be in a flash — is that to be measured and arrived at on a time basis?

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I mention these things merely to indicate that in my view a time basis is utterly inapplicable to an architect's work of this nature.

H

Then I think I have to take into account the difficulties encountered. I have before me, of course, the plain facts: the contours were rather difficult, and in view of the congested area of the site and also the fact that the east and west ends of the building already broke the Town and Country Planning Regulations. A set of drawings had to be prepared for the Planning Office to get consent for additional square footage of the building.

I

I am quite satisfied that there were considerable difficulties in connection with this particular site and it was not a straightforward ordinary task, and I am quite satisfied

A upon the evidence that the scheme set forth in the drawings can properly be described as drawings of great merit.

Then I think the court must take into account – I am merely instancing factors which must be considered – the experience of the architect, the standing of the architect. And here again I quote the words of BIRKETT, J:

B It is true to say that as people ascend to high positions in any profession as a rule their remuneration increases. A young man called to the Bar, to speak of the profession of which I know most, does not expect to be remunerated in the same scale on which great Leaders are remunerated; he must grow and develop and win the same position. I think, therefore, that when you decide the kind of fair and proper and reasonable fee to be given to an architect for a particular job you have not only to consider the job, its nature and the way in which it was carried out, but I think you have to consider the man himself.

C I have also to consider not only the difficulty of the work but the nature of the work which was done. I have to consider not only the interviews with the authorities, but the drawings and all the work that was necessitated in this matter. I think also I must consider the time spent upon it; I cannot exclude that. What I have excluded is to say that you can arrive at any figure exclusively upon time basis, because I do not think you can. I think you have to give credit for the amount of time that has been spent –and apart from that one has to remember all the time when work is carried out, you have the project in mind and you are thinking about this, that and the other, and how best the matter can be worked out.

D I have also I think to consider the rather important factor in this case that it was contemplated between the parties (although it was not agreed for partial services) that the usual method of dealing with it was by this method of percentage. That I cannot exclude and must keep in mind.

E [33] In the Federal Court case of *Udachin Development Sdn Bhd v Datin Peggy Taylor* [1985] 1 MLJ 121, Mohamed Azmi FJ held as follows also in respect of the claim for partial architectural services rendered:

G What is important for the purpose of ascertaining the partial remuneration or abandonment fee of the architect is the actual measure of partial work that had been carried out by him for Udachin in the building project. Clauses 3(iv) and 3(viii) of MIA Rules are in the following terms:

H 3. Mode and Time of Payment and Partial Services

I The architect is entitled to payment in stages as follows and in cases where the architect performs partial services for any reason, including the abandonment, deferment, substitution or omission of any project and/or works, or part thereof, or if the services of the architect are terminated, the fees in-respect of the services performed shall be as follows:-

(i) xx xx

(ii) xx xx

(iii) xx xx

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(iv) For taking client's instructions, preparing sketch designs, making approximate estimate of cost by cubic measurement or otherwise, and preparing working drawings, specification, or such other particulars as may be necessary for the preparation of bills of quantities by an independent quantity surveyor, or for the purpose of obtaining tenders, the fee shall be two-thirds of the appropriate percentage due on the estimated cost of such works.

B

(v) xx xx

(vi) xx xx

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(vii) xx xx

(viii) In cases where the architect performs partial services for any reason including the abandonment, deferment, substitution or part thereof, or if the services of the architect are terminated, the fees in respect of the services performed shall be as set down for the various stages of work as set out above.

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Thus, Clause 3 refers to the fees in respect of services performed. Under Clause 3 (iv), the architect's fee 'shall be two-thirds of the appropriate percentage due on the estimated cost of such works'. In the absence of express agreement to the contrary, the test to be applied in determining abandonment fee is the stage of work that has been completed by the architect. Before us the parties have agreed that the remuneration should be 2/3rd of the total fee payable. In the context of Clause 3 of MIA Rules, they have therefore conceded that works done by the architect had reached the stage of Clause 3 (iv).

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...

Indeed, the only way how the abandonment fee is to be reduced, is for Udachin to challenge the stage of work completed and prove that the extent of partial services claimed to have been rendered by the architect was untrue or manifestly exaggerated. Alternatively it should be shown that the services rendered were not based on P32. This has not been done to our satisfaction. In the circumstances, the words 'the estimated costs of such works' as provided in Clause 3(iv) of PAM or MIA Rules must in this particular case ...

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[34] Be that as it may, it is also necessary to examine the contractual terms made between the parties here on remuneration of partial services performed as contained in the proposal and appointment letter read together. If there is an inconsistency, the latter should prevail over the former as provided in the penultimate clause of the appointment letter as follows:

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The terms and conditions of this Letter of Appointment shall take precedence if there is any discrepancy/inconsistency between the terms and conditions of your proposal and this Letter of Appointment.

A In so finding, I am also guided by the dicta of Gopal Sri Ram FCJ in the Federal Court case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 as follows:

B The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER (Rep) 494, where he said:

C *Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the Court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.*

D

E This principle applies not only to documents drafted by laymen but also to those prepared by lawyers. See, *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] 129 CLR 99. (Emphasis added.)

F [35] In the premises, I find and hold that the applicable terms on the plaintiff's remuneration are as set out under terms and conditions in the appointment letter as follows:

- F** (a) The total professional fees excluding Government service tax shall be 1.25% of the costs of the Works but excluding costs of Interior Design (ID) Works.
- (b) Schedule of Payment is set out as per attached Appendix A.

G [36] The applicable 'costs of works' is as set out in the proposal as follows:

- H** 4. Based on the described services above and for hill-slope projects, our proposed professional fees shall be at least 1.25% of the cost of the works. The cost of the works will be as defined in paragraphs 4 of the Board of Engineers, Malaysia Notification on 20th April 1982 and as approved by the Minister of Works and Public Utilities on 13th May 1982.

I [37] It is provided in the abovementioned Board of Engineers, Malaysia notification as follows:

'Cost of works' includes the cost to the client of the works however incurred, including any payments (before deduction of any liquidated damages or penalties payable by the contractor to the client) made by the client to the contractor by way of bonus, incentive or ex-gratia payments or in settlement of claim; a fair valuation of any labour, materials, manufactured goods, machinery or other facilities

- provided by the client, and of the full benefit accruing to the contractor from the use of construction plant and equipment belonging to the client which the client has required to be used in the execution of the works; the market value, as if purchased new, of any second-hand materials, manufactured goods and machinery incorporated in the works; the cost of geotechnical investigations; and a fair proportion of the total cost to the client of any work in connection with the provision of diversion of public utilities systems which is carried out, other than by the contractor, under arrangements made by the consulting engineer, assessed with reference to the costs incurred by the consulting engineer in making such arrangements; but shall not include administration expenses; costs incurred by the client under the Agreement between the consulting engineer and the client; interest on capital during construction, and the cost of raising moneys required for carrying out the construction of the works; costs of land and way-leaves; and price variation arising from escalation of price; A
- [38] It is not in dispute between the parties that the total fee payable by the defendant to the plaintiff is 1.25% of the costs of works on the whole completion of the project. Moreover, the fee is payable progressively in stages based on the execution of the project as set out in the schedule of payment appended as Appendix A to the appointment letter. B
- [39] The parties are however firstly in disagreement over the applicable costs of works. C
- [40] According to the plaintiff, it should be RM350,000,000 which is the rounded up costs of RM336,193,895 for the whole project minus interior design works as estimated by Jurukur Bahan Bersatu who is the defendant's quantity surveyor for the project in its Preliminary Estimate No 2 (building and infrastructure works) dated 15 September 2014. D
- [41] In opposition, the defendant rebutted that it should be RM24,950,000 which is the costs of the infrastructure works of the project also as estimated by Jurukur Bahan Bersatu in its Preliminary Estimate No 1 ('infrastructure works') dated 8 September 2014. This is because the civil and structural engineering services rendered by the plaintiff to-date substantially related to infrastructure works only. E
- [42] The applicable costs of works is a question of contractual interpretation. In my opinion, the costs of works is the costs for the whole Project minus interior design works. This is because the scope of the civil and structural engineering consultancy services contract as set out in the proposal and acceptance letter is plainly for the whole project inclusive of the infrastructure works. It would have been different if there were distinct and separate contracts for the infrastructure works and building works of the project. I therefore find and hold that the applicable costs of works of the F
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- A** project is RM336,193,895. I am aware that the defendant relied on the case of *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi Ahmad & Ors* [2005] 2 MLJ 32; [2004] 2 MLRA 439 that the parties have by their conduct demonstrated that the applicable costs of works is for infrastructural works only. I do not however find that the parties have conducted themselves in that way during the currency of the civil and structural engineering consultancy services contract from the evidence adduced before me.
- B**

[43] Next, the parties are in further disagreement over the extent of civil and structural engineering services rendered by the plaintiff vis a vis the stages as set out in the Schedule of Payment which is reproduced below:

	Mode of Payment	%	Cumulative %
A.	Pre-contract (50%)		
D	1) Acceptance of preliminary design	10	10
	2) Submission of plans to authorities for approval	20	30
E	3) Upon obtaining approval from authorities	10	40
	4) Upon completion of all drawings for calling of tender	5	45
	5) Award of Contract	5	50
F	B. Post-contract (50%)		
	1) Contract Administration and Management (by % of progress of works on site)	45	95
	2) Issuance of Certificate of Completion and Compliance (CCC)	5	100

- G** **[44]** The plaintiff contended that it has completed 75% of stage A1, 75% of stage A2, 70% of stage A3 and 16.5% of stage A4. As a result, the plaintiff is entitled to RM328,125 + RM656,250 + RM306,250 + RM36,093.75 totalling to RM1,326,718.75.

- H** **[45]** After accounting for RM220,351.25 previously paid by the defendant, the plaintiff is hence entitled to the balance of RM1,172,749.55 (inclusive of 6% GST).

- I** **[46]** On the other side, the defendant contended that the plaintiff's civil and structural engineering services rendered were incomplete in that none of the stages set out in the Schedule of Payment were completed. There were some partial services performed only for stages A1 to A4 and in particular the plaintiff failed to submit and obtain the necessary pre-approvals from Ikram and SYABAS as well as submit and obtain the KSAS (Kementerian Sains dan

Alam Sekitar) approval and the Kebenaran Perancang (KM). The services definitely have not proceeded till stage A5, B1 and B2 of the Schedule of Payment.

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[47] As the result, the defendant had more than adequately paid the plaintiff to-date.

B

[48] The payment obligation of the defendant is a mixed question of contractual interpretation and fact. Similar to that in *Udachin Development Sdn Bhd v Datin Peggy Taylor*, there is a provision in the consultancy services contract here on remuneration of the plaintiff in the event of early termination of the contract. The relevant contractual provision is found in the appointment letter as follows with emphasis added by me:

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The termination of either party shall be mutually agreed. In pursuant to the termination notice:-

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1. the Consultant Engineer shall be paid for the remuneration including such fees as shall be due up to the effective date of termination (base on the Schedule of Payment as per Appendix A).

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[49] The aforesated clause is vague. My reading and objective understanding of it is that the plaintiff would, upon termination of the consultancy services contract, be only paid in relation to the services provided by the plaintiff for the stage(s) completed as at the date of termination. It is otherwise not payable for the services rendered for that stage if the particular stage(s) is(are) uncompleted. This is because remuneration will not be considered due as so expressly provided.

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[50] The requisite completion of a stage here, in my opinion, is akin to payment under an entire contract. In *KP Kunchi Raman v Goh Brothers Sdn Bhd* [1978] 1 MLJ 89 Gunn Chit Tuan J (later CJ (Malaya)) held as follows:

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I therefore found that the said agreement was, on its true construction, an entire contract, and the plaintiff was not relieved of his obligation to complete the contract work for the defendant. On this ground alone, the plaintiff's claim could have been dismissed (*Sumpter v Hedges* [1898] 1 QB 673). However, the rigours of the common law rule as shown in the older reported cases such as *Appleby v Myers* [1867] LR 2 CP 651 and *Whitaker v Dunn* [1887] 3 TLR 602 which require complete performance by a promisor as a condition precedent to his right of recovery under an entire contract has been modified by later decisions, and it is now established by the so-called doctrine of substantial performance that a promisor who has substantially performed his side of the contract may sue on the contract for the agreed sum, although he remains liable in damages for his partial failure to fulfil his contractual obligations. The authoritative statement of the law on this matter can be found in the said judgment of Denning LJ (as he then was) in the above-quoted case of *Hoening v Isaacs* where His Lordship said thus:

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- A ... the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the Courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good.
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- C
- D I have, as stated above, come to the conclusion that the said agreement was an entire contract, but as the doctrine of substantial performance has not been excluded by an express provision in the said agreement it would also be necessary to examine whether the plaintiff had substantially performed his contract.
- E
- F [51] It is therefore a question of fact whether the plaintiff has substantially completed any of the stages set out in the schedule of payment. Since the costs of works are based on the whole project, it follows that the completion of each stage must necessarily be for the whole project too and not merely infrastructural works.
- G [52] According to the plaintiff, it has completed stage A1 save for advise on the necessity of special surveys or investigations and advise on results thereof as well as obtaining the approvals of Ikram and SYABAS as at termination of the consultancy services contract. This has not been seriously challenged by the defendant.
- H [53] I have also reviewed the minutes of the client-consultant meetings which took place between 29 January 2013 and 10 February 2015 adduced by the parties. It is clear therein that the plaintiff had been extensively involved in the project and I am accordingly satisfied that the plaintiff had substantially completed its portion of services until the stage of acceptance of preliminary design of the project. In so finding, I am satisfied that the plaintiff was significantly involved in the infrastructural works. That notwithstanding, I further find that the plaintiff was also involved in advising on the building works preliminary design although the plaintiff's input was not as extensively required compared to the input required of the architect and town planner at the material time. They were all working collaboratively for about two years. Otherwise, the defendant would not be in the position of near ready to make
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the application for KM for the whole project in early 2015.

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[54] As to the uncompleted services in relation to stage A1, I do not see the requirement sought for special survey or investigation by the defendant. This is thus immaterial, if not irrelevant. Moreover, I find that the non-obtaining of the approval of Ikram and SYABAS is immaterial too because it is, in my view, a pre-requisite for completion of stage A2 instead.

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[55] In the circumstances, albeit conceded by the plaintiff that the services in stage A1 was not fully completed in two respects, I find and hold that the plaintiff has nonetheless substantially completed stage A1 of the whole Project and hence entitled to full payment for that stage.

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[56] From the evidence adduced particularly from the minutes of the client-consultant meetings, it is also clear that the plaintiff had not completed the other stages of the civil and structural engineering consultancy services beyond stage A1. The plaintiff had produced plans and drawings as well as made submissions and liaised with authorities to obtain approval particularly for the infrastructural works. However, I am not convinced from the evidence adduced in the minutes of the client-consultant meetings that the plaintiff had embarked on the structural drawings and plans of the building works for submission and obtaining approval from the requisite authorities pursuant to stage A2 and stage A3 of the schedule of payment. The approvals here must necessarily include not only the KM but also building plan approval under the Street Drainage and Building Act 1976. I was doubtful the plaintiff had produced the structural plans and drawings for the building works at the material time. Otherwise, the plaintiff would have adduced these structural plans and drawings of the building works and/or the plaintiff's time sheets recorded towards this end. None of these were produced. At the trial, the plaintiff candidly confirmed my doubt via SP1 who answered my question as follows:

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Q: Alright, because I was under the impression you have already gone past planning approval, doing the building plan?

A: No, we have not.

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[57] In the premises, I therefore find that the plaintiff had not substantially completed any of the other stages beyond stage A1 of the Schedule of Payment.

[58] As a result, the plaintiff is hence entitled to payment of stage A1 only as at the mutual termination of the consultancy services contract which is calculated at $10\% \times 1.25\% \times \text{RM}336,193,895 = \text{RM}452,423.69$.

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[59] Since the defendant has already paid RM220,351.25, the plaintiff

A should be still be paid the balance of RM177,927.56 plus 6% GST if applicable.

B [60] For completeness, I am aware that the defendant has in its closing submissions further contended that the plaintiff's claim is illegal because it contravened s 7A(1) of the Registration of Engineers Act 1967 ('the Act') which reads:

C 7A(1) Notwithstanding subsections 7(1) and (1A), a sole proprietorship, partnership or body corporate may practise as an Engineering consultancy practice and recover in court any fee, charge or remuneration or other form of consideration for any professional engineering services rendered by it pursuant to its practice as an Engineering consultancy practice carried out by virtue of this section.

D In this regard, the defendant submitted that the plaintiff's claim brought in this action is illegal in that the claim is for consultancy services not factually rendered by the plaintiff.

E [61] However and as pointed out by the plaintiff, this contention of illegality has not been pleaded in breach of O 18 r 8(1)(b) of the Rules of Court 2012.

F [62] As held in *Malaysia Building Society Bhd v Modern Crest Sdn Bhd & Ors* [2007] 2 MLJ 169, I am not dutibound to hear and determine unpleaded issues such as illegality as now raised by the defendant at this late stage.

G [63] In any event, I discern the alleged illegality centred on the plaintiff having made an unjustified excessive fee claim in this action. However, I do not see any illegality in it contravening s 7A(1) of the Act which has been enacted to prohibit remuneration of an unregistered engineer carrying out engineering consultancy services. In my view, s 7A(1) of the Act does not deal with an excessive fee claim made by a registered engineer. It is not in dispute here that the plaintiff is a registered engineer under the Act.

H [64] Finally, the defendant contended that the plaintiff's claim is barred by laches because of having acquiesced to the defendant's rightful refusal to pay excessive fees after their fee dispute had been determined by way of statutory adjudication pursuant to the Construction Industry Payment and Adjudication Act 2012. In this respect, the defendant stressed that the plaintiff waited for three years before instituting this action; thus the plaintiff must be accordingly prohibited from pursuing its claim in this action following the Court of Appeal case of *Choong Howei v Cheah Choo Eng & Ors and another appeal* [2015] 6 MLJ 95; [2018] 1 MLRA 650.

[65] In rebuttal, the plaintiff contended that this action has been properly

and timeously instituted within the prescribed period of limitation under the Limitation Act 1953 and referred to the case of *Muhamad Salleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603 in support of its contention.

[66] I am of the view that the application of the equitable defence of estoppel, acquiescence and laches is fact sensitive depending on the peculiar circumstances of each case as seen in the Federal Court case of *Low Chi Yong v Law Chi Hong & Anor* [2017] MLJU 1657. There must be prejudicial change in position of the defendant having been caused by the plaintiff's inaction to justify the invocation of the defence of laches. There is no cogent evidence of the same adduced by the defendant here.

[67] Consequently, I find and hold that the defendant is disentitled to invoke this equitable defence of laches in the circumstances of this case.

CONCLUSION

[68] For the foregoing reasons and in the absence of an offer to settle pursuant to O 22B of the Rules of Court 2012, I therefore enter judgment for the plaintiff in the sum of RM177,927.56 inclusive of 6% GST (if applicable) and interest of 5%pa thereon from 24 October 2018 till full realisation and costs of RM90,000 subject to 4% allocator.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh

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